IRENE MAN YEE CHING

v.

STANDARD CHARTERED BANK & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CIVIL SUIT NO: S7-22-826-1999]
24 NOVEMBER 2000

CIVIL PROCEDURE: *Pleadings - Striking out defence (part of) - Defendant's claim that plaintiff's sale of property breached Foreign Investment Committee guidelines and so against public policy - Thong Foo Ching & Ors v. Shigenori Ono - Whether issue yet to be settled - Whether a serious point of law to be determined at a full trial*

CIVIL PROCEDURE: *Pleadings - Striking out defence (part of) - Whether defence a statement of material facts - Whether maintainable under O. 18 rr. 8(1)(a) Rules of the High Court 1980*

CIVIL PROCEDURE: *Pleadings - Striking out defence (part of) - Whether defence only submissions and inferences - Whether contravened rules of pleadings - Rules of the High Court 1980, O. 18 r. 7(1)*

This was an appeal by the plaintiff against the senior assistant registrar's dismissal of her application to strike out paras. 4, 7, 8 and 9 of the 1st defendant's statement of defence. The plaintiff contended the following: (1) para. 4 of the defence stated that the plaintiff's sale of property had breached the Foreign Investment Committee ('FIC') guidelines and was therefore against public policy. However, the case of *Thong Foo Ching & Ors v. Shigenori Ono* had already ruled that FIC guidelines did not constitute public policy; (2) para. 7 amounted to a confession but without an avoidance. A defence of a confession without an avoidance was not maintainable under O. 18 r. 8(1)(a) of the Rules of the High Court 1980 ('RHC'); and (3) paras. 8 and 9 were not facts but submissions and inferences contrary to O. 18 r. 7(1) RHC which required only material facts to be stated in every pleading.

Held:

[1] The Court of Appeal in *Thong Foo Ching & Ors v. Shigenori Ono* did not rule on whether the FIC guidelines constituted public policy. Since that issue was not settled, the defence had raised a serious point of law which needed serious discussion at a full trial. As such, the defence at para. 4 was meritorious and hence not unreasonable. The plaintiff's application to strike out the defence at para. 4 therefore failed.

[2] The defence at para. 7 was a statement of material facts which the 1st defendant relied in its defence. Such a defence was maintainable against the plaintiff's statement of claim and did not fall foul of O. 18 r. 8(1)(a) RHC. Thus, the plaintiff's application to strike out the defence at para. 7 should also fail.

[3] Paragraphs 8 and 9 were not facts but submissions and inferences contrary to O. 18 r. 7 RHC which required only material facts to be stated in every pleading. As they offended the rules of pleadings, they should be struck out.

[Appeal allowed only to the extent of striking out paras. 8 & 9 of statement of defence.]

Case(s) referred to:

Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor and Other Appeals [2000] 3 CLJ 797 ***(foll)***

New Straits Times (M) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(refd)***

Pengkalen Holdings Bhd v. Dato' V Sivaparanjothi [1998] 1 CLJ 164 ***(refd)***

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 ***(refd)***

Legislation referred to:

Rules of High Court 1980, O. 18 rr. 7(1), 8(1)(a), 19(1)(a)

Other source(s) referred to:

The FIC Guidelines – To Comply Or Not To Comply That Is The Question [2000] 2 MLJ cxlv, Roger Tan Kor Mee, p clx

For the appellant/plaintiff - Chan Kai Meng; M/s Chan, Moosdeen & Partners
For the respondent/1st defendant - Effendy Othman; M/s Zaid Ibrahim & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Introduction

The plaintiff's claim is mainly for a declaration that the 1st defendant, whether by itself or its agents, was responsible for the loss of four original documents of title relating to her apartment (the property). The facts giving rise to the claim of the plaintiff are based on a sale by the plaintiff of the property to one Abdul Aziz bin Abdul Kadir. The said sale was aborted by said Abdul Aziz on the sole ground that the plaintiff was not able to produce at the time of completion, the originals of the four documents of title to the property. To the claim, the 1st defendant has pleaded several defences.

Application

The plaintiff filed an application by way of summons-in-chambers (encl. 12) under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (the RHC) to strike out paras. 4, 7, 8 and 9 of the statement of defence of the 1st defendant. The English versions of the paragraphs are:

> 4. Further and/or in the alternative, the 1st defendant will state that the purported sale of the property to the said Abdul Aziz bin Abdul Kadir on or about the 3rd October 1996 was illegal and/or unenforceable and/or against public policy in that the purported sale was in breach of an express provision of the Foreign Investment Committee (FIC) prohibiting the sale of the property for a 5 year period from 25 September 1992 to 25 September 1997.
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> Particulars
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> 4.1 The plaintiff was at all material times a non-resident of Malaysia at the time she purchased the property from one Yeap Lam Yang, on or about July 1992. The plaintiff was required to obtain the approval of the FIC before she was permitted to purchase the property.
>
> 4.2 The plaintiff obtained the approval of the FIC to purchase the property on or about 25 September 1992. The said approval also contained an express prohibition against the plaintiff selling the property for a 5 year period from the date of the FIC's consent.
>
> 4.3 In breach of the said express prohibition, the plaintiff purported to sell the property to Abdul Aziz bin Abdul Kadir within the 5 year period, and did not make any application to the FIC for approval to sell the property before expiry of the 5 year period.
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> 5. ...
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> 5.1 ...
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> 5.2 ...
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> 5.3 ...
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> 6. ...
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> 7. Further or in the alternative, the 1st defendant avers that David Chong & Co (2nd defendant) had made available to the plaintiff a statutory declaration to facilitate the sale of the property and had also caused to be furnished to the plaintiff certified true copies of the missing documents of title in or about October 1997.

8. Even if the plaintiff had not breached the condition imposed by the FIC (which is denied), the missing documents of title did not cause and/or create any legal or commercial impediment for the plaintiff to sell the property.

9. The loss of the missing documents of title was not a reasonable ground for a purchaser to abort a contract of sale since the plaintiff was in a position to provide legally recognised substitute documents in the form of certified true copies thereof.

The grounds of the application are that the defences are not maintainable in law. The Senior Assistant Registrar (SAR) heard the application. On 25 July 2000 the learned SAR was of the view that there were issues to be tried and she dismissed the application. Being dissatisfied, the plaintiff filed a notice of appeal to the judge-in-chambers against the decision of the learned SAR.

In *New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd & Anor* [1985] 1 MLJ 226, the then Federal Court held that in an application to strike out pleadings under O. 18 r. 19(1)(a) of the RHC, no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the defence disclosed no defence.

In *Pengkalen Holdings Bhd v. Dato' V Sivaparanjothi* [1998] 1 CLJ 164, I observed that striking out pleadings under O. 18 r. 19 of the RHC is a discretionary power to be exercised sparingly, according to the justice of the case. The summary process under this rule can only be adopted when a claim on the face of it is obviously unsustainable or is bound to fail.

Bearing in mind those principles, I now proceed to consider the appeal.

Paragraph 4

Before me, Encik Chan Kai Meng submitted that it is not open to the 1st defendant to say that the sale of the property was illegal and or unenforceable and or against public policy as the sale of the property by the plaintiff was made without obtaining the approval of the FIC which guidelines prohibit the sale of the property for a five year period from the date of the FIC's consent, and which are government policy that have not been elevated to a status of a public policy. He cited the case of *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674 CA in support.

Encik Effendy bin Othman, for the 1st defendant, on the other hand, argued that the Court of Appeal in *Thong Foo Ching* did not exactly rule that FIC guidelines do not constitute public policy and therefore, the question of whether or not FIC guidelines amount to public policy is still open and as such, the defence at para. 4 is not unreasonable.

With respect, I agree with Encik Effendy.

Ahmad Fairuz JCA (now a Federal Court Judge) in *Thong Foo Ching* said:

> The respondent was aware that both the agreements were actions to avoid paying higher taxes which should have been paid to the government. The respondent's action was clearly contrary to public policy. The consideration in the agreements were unlawful and as such, the agreements were void and unenforceable. What the parties did had the effect of defeating revenue laws and the court cannot knowingly enforce a void agreement.

On FIC guidelines, Siti Norma Yaacob JCA at p. 694 said:

> A reading of the guidelines shows that there is no penalty imposed for non-compliance of any of their provisions. From the very nature of the document itself and its purpose to eradicate poverty by restructuring the Malaysian society so as to correct any racial economic imbalance, at most I would say the guidelines impose a moral obligation only on those affected to comply with their provisions. In this respect, I agree with Mr. Wong that non-compliance or avoidance of the guidelines cannot render any agreement to be invalid or unenforceable. At most, non-compliance can be used as a means of refusing to exercise a discretion, a purely administrative act, as was done by the directors in *David Hey*'s case.

A close scrutiny of *Thong Foo Ching* clearly reveals that the Court of Appeal did not rule that the FIC guidelines constitute public policy even though the two agreements were in breach of the guidelines. In this respect, I wish to refer to an article by learned writer Roger Tan Kor Mee, "*The FIC Guidelines – To Comply Or Not To Comply That Is The Question* [2000] 2 MLJ cxlv, where at p. clx the writer concluded:

> Whilst they (FIC guidelines) have been held to be lacking of any legal effect, it does not mean that non-compliance of which will not bring about legal consequences. If the public policy argument succeeds in the next case that comes before the court, the consequence will be serious as such an agreement can be struck down as being unlawful under s. 24(e) CA (Contracts Act 1950).

In my view, the categories of contracts which are contrary to public policy are not closed. Since the issue of whether FIC guidelines amount to public policy or not has not been settled, I feel the defence has raised a serious point of law which needs serious discussion at a full trial. As such, I am of the opinion that the defence of the 1st defendant at para. 4 is meritorious and hence, not unreasonable. For these reasons, the plaintiff's application to strike out the defence at para. 4 therefore fails.

Paragraph 7

With regard to para. 7 of the defence, Encik Chan Kai Meng argued that the defence amounts to a confession but without an avoidance. According to him the defence of a confession without an avoidance is not maintainable under O. 18 r. 8(1)(a) of RHC.

With respect, I do not agree with him. It is true that O. 18 r. 8 (1)(a) of the RHC states in effect that a defendant must plead facts which make the claim of the opposite party not maintainable. But in this case, the 1st defendant did not confess the missing documents of title were lost by the bank, *ie*, the 1st defendant. The 1st defendant puts the blame on the 2nd defendant by stating at para. 5.3 of the defence that the missing documents of title were lost by David Chong & Co, the 2nd defendant. Then at para. 6, the 1st defendant does not admit paras. 15(a) to 15(c) of the plaintiff's statement of claim which alleged the loss of the said documents by the 1st defendant, and puts the plaintiff to strict proof thereof. By its provision, para. 7 is clearly a further or an alternative defence to the defence at para. 6. Paragraph 7 avers that the 2nd defendant had made available to the plaintiff a statutory declaration to facilitate the sale of the property and had also caused to be furnished to the plaintiff certified true copies of the missing documents of title which were lost by the 2nd defendant. Thus, to my mind, the defence at para. 7 is a statement of material facts which the 1st defendant relies in its defence. Such a defence is maintainable against the plaintiff's statement of claim and it does not fall foul of O. 18 r. 8(1)(a) of the RHC. On this ground, the plaintiff's application to strike out the defence at para. 7 also fails.

Paragraphs 8 and 9

Regarding paras. 8 and 9, I, with respect, agree entirely with Encik Chan Kai Meng that they are not facts but submissions and inferences contrary to O. 18 r. 7(1) of the RHC which requires only material facts to be stated in every pleading.

In para. 8, the 1st defendant states that:

> ... The missing documents of title did not cause and/or create any legal or commercial impediment for the plaintiff to sell the property.

The question of whether or not the missing documents did cause and/or create any legal or commercial impediment is a moot point for canvassing. It is not a fact.

In para. 9, the 1st defendant states that:

> The loss of the missing document of title was not a reasonable ground for a purchaser to abort a contract of sale since the plaintiff was in a position to provide legally recognised substitute documents in the form of certified true copies thereof.

Whether or not the loss is a reasonable ground to abort a contract of sale is also a moot point for canvassing. It is also not a fact.

The materials mentioned in paras. 8 and 9 are obviously matters for arguments. They are highly irregular as they offend the rules of pleadings. In *Lembaga Pemegang Amanah Yayasan Sabah & Anor v. Datuk Syed Kechik Syed Mohamed & Anor and Other Appeals* [2000] 3 CLJ 797, the Court of Appeal at p. 807 reminded:

> It is a cardinal rule in civil proceedings that only facts need be pleaded. For this we rely on O. 18 r. 7 of the Rules that requires every pleading to contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence....

This being the case, I hold that paras. 8 and 9 of the statement of defence of the 1st defendant are not permitted in pleadings and accordingly, I order that they are to be struck out.

To that extent, the appeal is allowed with costs.